Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRIAN JONES,

Petitioner,

-v-

JOHN KEANE, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Petitioner's state court claim that his murder conviction was not supported by legally sufficient evidence fairly present, for purposes of exhaustion under 28 U.S.C.A. §2254(b)(1)(A), his constitutional challenge to New York's statutory distinction between "depraved indifference" murder and reckless manslaughter?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court's opinion (Hon. Charles L. Brieant, USDJ) dated May 22, 2002, granting the petition for a writ of habeas corpus is annexed as Appendix A. The Second Circuit Court of Appeals' opinion (Hon. Barrington D. Parker, Jr., USCJ) dated May 13, 2003, reversing the Judgment of the District Court is published at 329 F.3d 290 (2nd Cir 2003) and is annexed as Appendix B.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Judgment on May 13, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 2254(b)(1)(A), which provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . ."

N.Y.S. Penal Law § 125.15(1), which provides that a person is guilty of manslaughter in the second degree when "[h]e recklessly causes the death of another person".

N.Y.S. Penal Law § 125.25(2), which provides that a person is guilty of murder in the second degree when: "[u]nder circumstances evincing a depraved indifference to human life,

he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person".

STATEMENT OF THE CASE

Procedural History

Petitioner, Brian Jones ("Petitioner") was convicted in the County Court, County of Orange, State of New York, after a jury trial of Murder in the Second Degree, and Criminal Possession of a Weapon in the Second and Third Degrees. He was sentenced on December 20, 1996, as a juvenile to indeterminate sentences of 9 years to life on the murder charge, 2 to 6 years on the second degree weapons possession charge, and 1 to 3 years on the third degree weapons possession charge, all sentences ordered to run concurrently. His conviction was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Department, in a Decision dated November 1, 1999. *People v Jones,* 266 AD2d 236 (2nd Dept. 1999) Leave to appeal was denied by the New York Court of Appeals on May 24, 2000. *People v Jones,* 95 NY2d 798 (2000)[1]

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[1] On July 31, 2001, Petitioner filed a motion to vacate the judgment of conviction based upon his claim of ineffective assistance of trial counsel. By Decision of the County Court dated October 9, 2001, the motion was denied. On July 30, 2001, Petitioner filed an application for a writ of error *coram nobis* with the Appellate Division, Second Department, based upon his claim of ineffective assistance of appellate counsel. By Decision and Order of the Appellate Division dated November 5, 2001, the application was denied. On December 6, 2001, Petitioner filed an application for leave to appeal to the Appellate Division from the denial of his C.P.L. 440.10 motion. That application was denied by Decision and Order of the Appellate Division dated February 20, 2002.

On March 6, 2002, Petitioner filed a petition for a writ of *habeas corpus* challenging his conviction which was granted on May 22, 2002, by the United States District Court for the Southern District of New York (Judge Charles L. Brieant). *Jones v Keane,* S.D.N.Y. Civil Docket No. 02 CV 1804 (CLB).[2]

By Opinion dated May 13, 2003, the United States Court of Appeals for the Second Circuit held that Petitioner failed to exhaust his federal constitutional claim in the state courts and therefore reversed the Decision of the District Court and dismissed the petition for a writ of habeas corpus. *Jones v Keane*, 329 F.3d 290, 296 (2nd Cir 2003).

The Trial Court Proceedings

The evidence viewed most favorably to the prosecution shows that on a few days prior to June 17, 1996, the victim, Germaine Fields told Petitioner's 16 year old girlfriend, LaToya Williams, who was then pregnant with Petitioner's child, that he, Fields, was going to stab Petitioner "in the stomach and push it down inside and mess up his insides". On June 17th, at about 11:00 p.m., Williams was on the street 3 or 4 doors from her house, talking to Petitioner, when Fields came up to them "in a violent mood" cursing in Petitioner's face. Petitioner was just standing there, Fields' arms were up in the air, and Williams' father, John Smith, told Fields to leave them alone. Fields yelled at Smith, threatened Petitioner, and probably struck Petitioner.

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[2] The District Court directed that "[t]he writ shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. The Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality." *Jones,* at 12.

Smith tried to talk to Fields, but Fields jumped and yelled at Smith, as if wanting a fight. Fields then turned to argue with Petitioner in a hostile manner. Smith took Petitioner down the street and Williams moved Fields away. Fields tried to get to Petitioner and, while he, Fields, and Williams were entangled in a struggle, they fell hard to the cement sidewalk. Petitioner, who had been heeding Smith, was moving toward Smith's porch. When Williams and Fields went to the ground, Petitioner ran around a van, and, from a distance of about two feet, pointed a gun downward at Fields who was lying on his back. Petitioner then fired two shots that struck Fields in the neck and killed him. Petitioner fled the scene and checked into a motel under a false name. He was arrested at the motel the next morning.

Petitioner testified that he met Fields about 4 weeks prior to the shooting. Fields told Petitioner that he was a member of a gang called the Crips. On June 10th, Petitioner observed Fields with a gun. On June 14th, Williams told Petitioner that Fields had said he was going to kill Petitioner: "She said he's going to stab me in my stomach since I was really skinny. He knew how to kill people with knives."

At the scene of the shooting, according to Petitioner, Fields was yelling and cursing at Petitioner, face to face, and bumped his chest. Fields seemed high and was saying, "What the fuck are you doing with Peach. Get out of here before I kill you. I want to hurt you. You better leave." Fields kept yelling for Petitioner to leave or he would get killed, and trying to grab Petitioner, when Smith ran up and told Fields to leave them alone, whereupon Fields ran up to Smith and started yelling in his face, Petitioner told Fields to leave Smith alone, and Fields "jumped back in [Petitioner's] face." Fields then tried to grab Petitioner, but Williams grabbed Fields, and Smith grabbed Petitioner. Petitioner walked with Smith, but with his back turned, watching Fields and Williams. Fields grabbed Williams, was yelling at her, and threw her against a wall; Fields tried to

run toward Petitioner, but Williams pulled him back. When Fields threw Williams to the ground, Smith let go of Petitioner, and Petitioner ran over to Williams and tried to pick her up off the ground, "but it looked like she was unconscious, like she blacked out . . . she wouldn't get up." Fields was holding onto Williams and "wouldn't let go". Fields "started reaching, put his hand inside his pocket . . . looked like he had some kind of object in his pocket because his pocket was like bulging out like it could have had a weapon in it." Petitioner thought he had a gun: Fields was "reaching really quick and still had a hold of LaToya, and as soon as he put his hand in his pocket, I put out my gun . . . and fired a shot."[3] He fired twice, aiming at Field's shoulder: "I wasn't trying to kill him, I just wanted to hurt him so he wouldn't kill LaToya or me."

At the conclusion of the People's case as well as at the conclusion of the proof at trial, defense counsel moved to dismiss the charges[4] pursuant to N.Y.S. Criminal Procedure Law CPL §290.10 on the ground that the evidence adduced was legally insufficient. Both motions were denied.

After about 11 hours of deliberation, including readbacks, the jury acquitted Petitioner of intentional murder, but found him guilty of depraved indifference murder and of both weapons possession counts. Petitioner received the maximum sentence for a juvenile offender, 9 years to life, with lesser concurrent sentences on the weapons possession convictions.

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[3] These events happened "really fast"; Petitioner was scared that Fields was going to kill him or LaToya, and he was especially concerned that LaToya was then unconscious. At this point, Smith was about 8½ feet away – a pole could have blocked his view of the shooting; although there was a street light, it was "dim".

[4] With the exception of Criminal Possession of a Weapon in the Third Degree.

Petitioner's Constitutional Challenge

New York State Penal Law § 15.00(6) provides that the term "culpable mental state" means "intentionally" or "knowingly" or "recklessly" or with "criminal negligence" as these terms are defined in N.Y.S. Penal Law § 15.05. The term "recklessly" is defined under N.Y.S. Penal Law § 15.05(3) as follows:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

N.Y.S. Penal Law § 125.15(1) provides that a person is guilty of manslaughter in the second degree when "[h]e recklessly causes the death of another person". N.Y.S. Penal Law § 125.25(2) provides that a person is guilty of murder in the second degree when: "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person".

Petitioner claimed in his petition for a writ of habeas corpus that the history of the New York Court of Appeals' efforts to interpret the term "depraved indifference" is both confused and contradictory and that a review of these efforts shows that there is no principled basis upon which to distinguish depraved indifference murder and reckless manslaughter. Petitioner

argued that a term which was once reserved for the most heinous, but unintentional conduct, "depraved indifference" has been rendered so vague that it can be applied by prosecutors to any reckless homicide.

In one of its earlier cases, *People v Poplis*, 30 NY2d 85, 87 (1972), the New York Court of Appeals held that repeated "brutal, callous and inhuman" beatings which were inflicted by defendant on the 3 ½ year old child of his wife and which resulted in injuries producing death fit within the accepted understanding of the kind of recklessness involving a depraved indifference to human life as was required for conviction under the murder statute. The Court explained that "[t]he continued brutality toward a child . . . fits within the accepted understanding of the kind of recklessness involving 'a depraved indifference to human life'." *Poplis*, 30 NY2d at 88.[5]

According to the *Poplis* Court, "depraved indifference" was a concept reflective of the mens rea element of the crime, elevating it from the mere "recklessness" of manslaughter to the "depravity and utter recklessness" of something more serious and deserving of the same punishment as murder.

Later, in *People v Register*, 60 NY2d 270 (1983), the New York Court of Appeals stated that to bring a defendant's conduct within the depraved mind murder statute, the People are required to establish that the defendant's act was imminently

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[5] The *Poplis* Court cited *People v Jernatowski*, 238 NY 188 (1924) where the Court upheld a jury finding that the defendant's firing two or more shots into a house where he knew there were human beings, killing one of the occupants, "evinced a wicked and depraved mind, regardless of human life, and which amply supplied the evidence of malice and felonious intent". *Poplis*, 30 NY2d at 88. The Court in *Poplis* also referred to *Darry v People*, 10 NY 120, which construed the statutory language to include "circumstances evincing great depravity and utter recklessness in regard to human life". *Poplis*, 30 NY2d at 89.

dangerous, presented a very high risk of death to others and was committed under circumstances which evidenced a wanton indifference to human life or a depravity of mind. Rejecting the defendant's contention that the trial court erred in refusing to charge the jury that it could consider defendant's intoxication in determining whether he acted "[u]nder circumstances evincing a depraved indifference to human life", the *Register* Court held that this statutory phrase refers neither to the *actus reus* nor the mens rea of the crime, but, to the factual setting in which the crime occurs:

> Depraved mind murder resembles manslaughter in the second degree (a reckless killing which includes the requirement that defendant disregard a substantial risk [Penal Law, § 125.15, subd. 1; § 15.05, subd. 3]), but the depraved mind murder statute requires in addition not only that the conduct which results in death present a grave risk of death but that it also occur "[u]nder circumstances evincing a depraved indifference to human life." This additional requirement refers to neither the *mens rea* nor the *actus reus*. If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur – objective circumstances which are not subject to being negatived by evidence of defendant's intoxication.

Register, 60 NY2d at 276.

The Court in *Register* stated that "in a depraved mind murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death". *Register*, 60 NY2d at 276. As to the distinguishing features of these risks, the Court made the following, somewhat baffling statement: "The phrase '[u]nder circumstances evincing a

depraved indifference to human life' refers to the wantonness of defendant's conduct and converts the *substantial* risk present in manslaughter into a *very substantial* risk present in murder". *Register*, 60 NY2d at 276-277 (emphasis added).

The Court in *Register* stated that while the concept of depraved indifference functions "to objectively define the circumstances which must exist to elevate a homicide from manslaughter to murder", *Register*, 60 NY2d at 278, "'recklessness' is", nevertheless, "the *mens rea*, and the only *mens rea*, of the crime". *Register*, 60 NY2d at 278. The *Register* Court also stated, however, that "the statutory requirement that the homicide result from conduct evincing a depraved indifference to human life is a legislative attempt to qualitatively measure egregiously reckless conduct and to differentiate it from manslaughter." *Register*, 60 NY2d at 279. Thus, while insisting that the "depraved mind" element of the crime is separate and distinct from the *mens rea* of recklessness, it is "egregious" recklessness which differentiates it from manslaughter.

Judge Jason, however, pointed out in his dissenting opinion in *Register* that:

> [a]s the majority concede[d], the predecessor statutes to subdivision 2 of section 125.25 of the Penal Law defined the requisite *mens rea* "as a depraved mind" . . . Thus, unless a significant change was intended by the Legislature in enacting subdivision 2 of section 125.25, this statute must be similarly construed as characterizing "depraved indifference" as a mens rea.

Register, 60 NY2d at 281-282. This contrary construction of the depraved mind murder statute, Judge Jason contended, "is not only consistent with the Legislature's intent, the history of the statute and precedent of th[e Court of Appeals], but is also in

line with the basic underpinnings of our system of criminal justice."

Judge Jason observed that "[t]he rule announced by the [*Register*] majority . . . effectively eviscerate[d] the distinction between manslaughter in the second degree (Penal Law, § 125.15, subd. 1) and murder in the second degree (Penal Law, § 125.25, subd. 2) with respect to the accused's state of mind." *Register*, 60 NY2d at 282. Judge Jason explained that a person acts with depraved indifference, thereby elevating his reckless conduct from manslaughter to murder, "not because the surrounding circumstances happened to create a 'grave' as opposed to a 'substantial' risk, but because the accused has acted with greater culpability and a wickedness akin to that of one whose conscious objective is to kill." *Register*, 60 NY2d at 286. Judge Jason continued:

> [A]s a result of the majority's interpretation of the statute, prosecutors will be able to obtain murder convictions simply by proving that the defendant acted recklessly in killing another. This is so because the simple fact that the defendant's conduct resulted in the victim's death will, with 20/20 hindsight, be proof enough to a jury that the circumstances existing at the time and place of the killing presented a "grave risk" of death and that the defendant, therefore, acted with depraved indifference to human life. This result is clearly at odds with the legislative scheme set forth in article 125 of the Penal Law.

Register, 60 N Y2d at 286-287.

In *People v Roe*, 74 NY2d 20 (1989), the majority of the Court, following *Register*, held that depraved indifference murder

> differs from manslaughter . . in that it must be shown that the actor's reckless conduct is imminently dangerous and presents a grave risk of death; in manslaughter, the conduct need only present the lesser 'substantial risk' of death . . . Whether the lesser risk sufficient for manslaughter is elevated into the very substantial risk present in murder . . . depends upon the wantonness of defendant's acts – i.e., whether they were committed "[u]nder circumstances evincing a depraved indifference to human life" (Penal Law § 125.25[2]). This is not a mens rea element which focuses "upon the subjective intent of the defendant, as it is with intentional murder (Penal Law, § 125.25, subd. 1)"; rather it involves "an objective assessment of the degree of risk presented by defendant's reckless conduct" . . .

Roe, 74 NY2d at 24. The *Roe* majority reiterated that "[t]he only culpable mental state required for murder under subdivision (2) of Penal Law § 125.25 (depraved indifference murder) . . . is recklessness – the same mental state required for manslaughter, second degree, under subdivision (1) of Penal Law § 125.15". *Roe*, 74 NY2d at 24. Emphasizing again that "depraved indifference" does not pertain to the *mens rea*, the Court stated:

> In a trial for murder under Penal Law § 125.25(2), proof of defendant's subjective mental state is, of course, relevant to the element of recklessness, the basic element required for both manslaughter in the second degree and depraved indifference murder (see, Penal Law § 15.05[3]). Evidence of the actor's subjective mental state, however, is not pertinent to a determination of the additional element required for depraved indifference murder: whether the objective circumstances bearing on the nature of a defendant's

> reckless conduct are such that the conduct creates a very substantial risk of death . . .

Roe, 74 NY2d at 24-25, *citing Register*, 60 NY2d at 276- 277; *People v Gomez*, 65 NY2d 9, 11.[6]

Judge Bellacosa, in a dissent in line with Judge Jason's in *Register*, observed that the majority opinion in *Roe* "finalizes the obliteration of the classical demarcation between murder and manslaughter in this State". *Roe*, 74 NY2d at 29. Judge Bellacosa explained that the "catapulting ingredients" which elevate reckless manslaughter to murder are "gravity and depravity" and that

> [o]ther synonyms used to try to understand the essence of the escalating difference include malignant, malicious, callous, cruel, wanton, unremorseful, reprehensible and the like. The semantics alone prove that the analysis necessarily includes some subjective, gradational assessment.
>
> While the tangible content of "depraved indifference to human life" is thus elusive, the wantonness of the conduct augmenting the reckless culpable mental state must also manifest a level of callousness and extreme cruelty as to be "equal in blameworthiness to intentional murder" . . . I allude to some of the same case illustrations in this regard as the majority does, except I emphasize the particular escalating depravity facts that the majority avoids:

---

[6] The Court stated: "Because the escalating factor – depraved indifference to human life – is based on an objective assessment of the circumstances surrounding the act of shooting and not the mens rea of the actor . . . the evidence . . . concerning defendant's mens rea – his emotional condition in the aftermath of the killing – . . . is beside the point." *Roe*, 74 NY2d at 25.

> firing a gun three times in a packed barroom, having boasted in advance an intention to kill someone (id.); driving a car at high speed on a crowded urban street and failing to apply the brakes after striking one person . . . [and] continuously beating a young child over a five-day period . . .

Roe, 74 NY2d at 29-30.

Judge Bellacosa, like Judge Jason, expressed concern about this "'evisceration' of the 'distinction' between manslaughter and murder", *Roe*, 74 NY2d at 31, *quoting Register*, 60 NY2d at 284, and stated that the majority's application of "depraved indifference" to the facts in *Roe* complete[d] the homogenization." *Roe*, 74 NY2d at 31. By affirming *Roe's* conviction, said Judge Bellacosa, the State courts had "functionally . . . discard[ed] and disregard[ed] the legislatively drawn distinction between manslaughter and murder". *Roe*, 74 NY2d at 35.

In *People v Cole*, 85 NY2d 990 (1995) the Court of Appeals rejected the defendant's contention that Penal Law § 125.25(4) is unconstitutionally vague:

> This Court held in *People v. Poplis*, 30 N.Y.2d 85, 88, 330 N.Y.S.2d 365, 281 N.E.2d 167 that "conduct with 'depraved indifference' to 'human life' * * * is the kind [of conduct] which has been rather well understood at common law." In fact, we stated in *Poplis* that brutality toward a child, such as the conduct with which defendant was charged, "fits within the accepted understanding of the kind of recklessness involving 'a depraved indifference to human life'" (*id.*, at 88, 330 N.Y.S.2d 365, 281 N.E.2d 167). Contrary to defendant's argument, our decision in *People v. Register*, 60 N.Y.2d 270, 469

> N.Y.S.2d 599, 457 N.E.2d 704, cert. denied 466 U.S. 953, 104 S.Ct. 2159, 80 L.Ed.2d 544 did not unsettle this well-established common-law understanding of the "depraved indifference" element. Rather, it merely clarified that that element is an objective aggravating circumstance rather than a part of the crime's mens rea.

Cole, 85 NY2d at 992.

Finally, in *People v Johnson*, 87 NY2d 357 (1996) -- in which the defendant shot the victim in a parking lot during an altercation -- the Court of Appeals held that Penal Law § 125.15(2) is not unconstitutionally vague because "conduct with depraved indifference to human life is well understood". *Id.* at 360, *citing Cole*, 85 NY2d 990, and *Poplis*, 30 NY2d 85, 88.

In view of these New York Court of Appeals decisions, Petitioner argued that the distinction between reckless manslaughter and depraved mind murder, as merely reflecting the distinction between a "substantial" and a "very substantial" risk, is unconstitutionally vague and necessarily results in arbitrary and irrational selectivity in the prosecution of these offensives.

The Decisions Below

The District Court agreed with Petitioner's claim that the New York Court of Appeals conflated the penal statutes defining "depraved indifference" murder and reckless manslaughter. The District Court held that "when two different statutes are construed by New York's highest Court to reach the same conduct, or indistinguishable conduct, and one carries a far lesser penalty, allowing a grand jury to choose to indict for either one is a clear denial of equal protection." *Jones*, at 9. The District Court concluded

> that the conviction for depraved indifference murder as applied to the facts of the case as the jury must have found them violated Petitioner's Constitutional right to the equal protection of the laws, as well as substantive due process. There was no rational basis by which a grand jury could choose to indict in this case for depraved indifference murder as opposed to reckless manslaughter, and the trial jury was denied the opportunity to choose between two identical crimes, one of which carries a far lesser penalty. A rational jury could not be expected to differentiate between a "grave risk of death" and a "substantial risk of death", as required by the New York Court of Appeals. This is a distinction without a difference . . .

Jones, at 10-11.[7]

---

[7] Shortly after the District Court's Decision issuing the writ, a seriously fractured Court of Appeals in *People v Sanchez*, 98 NY2d 373 (2002) revisited this issue. In a section of a dissenting opinion entitled "Conflating Depraved Indifference Murder with Second Degree Manslaughter", Judge Rosenblatt stated:

> To the extent that it endorses Register, the majority . . . conflates depraved indifference murder with reckless manslaughter. After today, depraved indifference murder can thus be used as a proxy for not one but two separate crimes.
>
> In concluding that depraved indifference murder has a mens rea of ordinary recklessness, the Court in Register essentially took the "depraved" out of depraved indifference, so that depraved indifference murder is virtually indistinguishable from reckless manslaughter. . .
>
> Register conflates the two crimes not only by giving them the same mens rea, but also by seeking to differentiate them only in terms of "objective circumstances" that are all but indistinguishable. Thus, for the factfinder, everything turns on whether the defendant's conduct created a "grave" risk of death as opposed to a "substantial" risk of death. I think it is too much to ask of any juror. The difference between reckless manslaughter, which carries a minimum punishment of one year in prison, and depraved indifference murder, which carries a minimum punishment

(continued...)

As to the issue of whether Petitioner met the exhaustion requirement of 28 U.S.C.A. § 2254(b)(1)(A), the District Court held:

> Petitioner argues, and this Court agrees, that in the context of this case, raising in the state court the issue of sufficiency of the evidence was sufficient to raise ("inextricably intertwined with") a challenge to the statutory criteria for distinguishing reckless manslaughter from depraved indifference murder.
>
> The requirement for exhaustion is not intended to exhaust the petitioner or his or her lawyers, but is designed to give the state courts the opportunity to address and correct violations of Constitutional rights. That purpose is fulfilled when the state court

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[7](...continued)
of 15 years in prison, should not turn on the razor-thin distinction between "substantial" and "grave."

Sanchez, 98 NY2d at 406-407. Judge Rosenblatt also observed that

> the Register Court's formulation has the effect of treating defendants with the exact same mental culpability unequally by giving them vastly different sentences even though their moral culpability is identical. This consequence violates a fundamental principle of the criminal law, which seeks to punish defendants in proportion to the blameworthiness of their offense. . . If depraved indifference murder and reckless manslaughter have the same mens rea (i.e., ordinary recklessness), then two defendants with exactly the same mental culpability can be separately convicted of two different crimes (murder and reckless manslaughter) and receive vastly different punishments. As one harsh critic of Register has asked, "How can it be just to punish for murder, one offender whose mental culpability is no greater than that of another guilty only of manslaughter--thereby exposing the former to an additional fifteen years of imprisonment?" (Gegan, More Cases of Depraved Mind Murder: The Problem of Mens Rea, 64 St. John's L. Rev. at 435.)

Sanchez, 98 NY2d at 407-408.

> has a fair and meaningful chance to grant relief on what is substantially the same claim raised in federal court. *O'Sullivan v. Boerckle* 526 U.S. 838, 844 (1999) *Vasquez v. Hillary* 474 U.S. 254, 257 (1986). In the context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.

Jones, at 11-12.

The Court of Appeals reversed the Decision of the District Court, holding that Petitioner failed to exhaust his federal constitutional claim in the state courts:

> In advancing his insufficiency claim in state court, Jones did not argue that New York's depraved indifference murder statute was unconstitutionally vague. Instead, he argued that the evidence demonstrated that he reasonably believed that Fields possessed a weapon and that he, fearing for his life, reacted in self defense. In other words, in the state courts, Jones pressed his claim of self defense; he presented neither the factual nor legal premises underpinning his subsequent claim that the statute itself was unconstitutionally vague. Accordingly, Jones failed to exhaust this claim.

Jones v Keane, 329 F.3d 290, 296 (2nd Cir 2003).

REASONS FOR GRANTING THE WRIT

Petitioner's Claims were Exhausted in the State Courts

Petitioner submits that his constitutional arguments concerning the statutory distinction between manslaughter and depraved indifference murder are interrelated with his arguments concerning the insufficiency of the evidence and, as such, were fairly presented in his state court proceedings.

The exhaustion doctrine provides that a habeas petitioner seeking to upset his state conviction on federal grounds must first have given the state courts a fair opportunity to pass upon his federal claim. *Picard v. Connor*, 404 U.S. 270, 275 (1971); 28 U.S.C.A. § 2254(b)(1)(A). This requirement is neither rigid nor inflexible, but is designed to give state courts the opportunity to address and correct alleged violations of federal rights. *Granberry v Greer,* 481 U.S. 129, 133-134 (1987) The exhaustion standard is met when a habeas petitioner previously provides the state courts with a fair and meaningful opportunity to grant relief on what is in "substance" the same claim now sought to be reviewed in federal court. *O'Sullivan v Boerckel,* 526 U.S. 838, 844 (1999); *Vasquez v Hillary,* 474 U.S. 254, 257 (1986). A habeas petitioner exhausts his available state court remedies by "fairly present [ing]" his claims to the state courts. *Wilwording v. Swenson*, 404 U.S. 249 (1971) (per curiam); *Galarza v Keane,* 252 F.3d 630, 638 (2nd Cir. 2001); *Daye v Attorney General,* 696 F.2d 186, 191 (2nd Cir. 1982) (*en banc*).

A defendant may "fairly present" the substance of a federal constitutional claim to the state court without citing "book and verse on the federal constitution." *Picard*, 404 U.S. at 278. A claim is "fairly presented" even when it is supported by varying legal arguments in the state courts. *Sanders v United States,* 373 U.S. 1, 16 (1963) What is important is that the state courts are given arguments that place them on notice of the elements of the

subject claim. *Wells v Maass*, 28 F.3d 1005, 1008-1009 (1st Cir. 1994) The requirement that the state court be given a reasonable opportunity to pass on the federal habeas claim is therefore satisfied if the legal basis of the claim made in state court was the "substantial equivalent" of that of the habeas claim. *Picard*, 404 U.S. at 278; *see also Ulster County Court v. Allen*, 442 U.S. 140, 147-48 n. 5 (1979).[8]

Petitioner's insufficiency-of-the-evidence claim to the state courts was the "substantial equivalent" of his federal constitutional claims to the federal courts. "New York State case law makes clear that the 'legally sufficient evidence' standard derives from the federal constitutional due process right discussed in *Jackson v. Virginia*, [443 U.S. 307, 321(1979)]" and that "[t]he New York Court of Appeals, in applying this standard, has frequently adverted to the *Jackson* case itself." *Santana v. Kuhlmann*, 232 F.Supp.2d 154, 165 (S.D.N.Y. 2002), *citing as examples*, *People v. Contes*, 60

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[8] "[T]he nature or presentation of the claim" in the state forum necessarily must be "likely to alert the court to the claims federal nature". *Lurie v Wittner*, 228 F.3d 113, 123 (2nd Cir. 2000), *quoting Daye*, 696 F.2d at 192. Put another way, the exhaustion doctrine requires that the issue be presented "in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question". *Fortini v Murphy*, 257 F.3d 39, 44 (1st Cir. 2001), *quoting Scarpa v DuBois*, 38 F.3d 1, 6 (1st Cir.1994). "[A] petitioner need not expressly cite 'chapter and verse of the Constitution,'" *Cox v Miller*, 296 F.3d 89, 100 (2nd Cir. 2002), *quoting Daye*, 696 F.2d at 194, in order for the issue to be adequately presented. Citing a specific constitutional provision, while preferable, is not necessary to alert a state court as to the claim's federal nature. Other ways in which a petitioner may alert the state court to the constitutional nature of a claim without referring chapter and verse to the U.S. Constitution include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation. *Ramirez v Attorney*, 2001 WL 1028326, *5-6 (2nd Cir.).

N.Y.2d 620, 621 (1983); *People v. Taylor*, 94 N.Y.2d 910, 911 (2000); *see, also, Cowan v. Artuz*, 96 F.Supp.2d 298, 307 (S.D.N.Y.2000) (for exhaustion purposes, a claim in New York State court regarding sufficiency of evidence raises issue of federal due process); *compare, West v. Wright*, 931 F.2d 262, 266 (4th Cir. 1991), *reversed on other grounds*, 505 U.S. 277 (1992) ("Any challenge to the sufficiency of the evidence to convict in a state prosecution is necessarily a due process challenge to the conviction.") *citing Jackson*, 443 U.S. at 321; *In re Winship*, 397 U.S. 358, 364 (1970); *compare, also, Evans v. Court of Common Pleas, Delaware County, Pa.*, 959 F.2d 1227, 1231 (3rd Cir. 1992) (insufficiency of the evidence claim, even if framed in state law rather than federal constitutional terms, necessarily implicates federal due process rights); *Tamapua v. Shimoda*, 796 F.2d 261, 263 (9th Cir.1986) ("Sufficiency of evidence to convict is a fundamental concern of the due process clause.").

Thus the terms of Petitioner's state court claim on the insufficiency of the evidence, taken in light of the facts and verdict upon which it was based, quite clearly presented the Petitioner's constitutional due process claim. A review by the state courts of Petitioner's legal sufficiency argument necessarily involved a legal assessment of whether the required inferences of guilt could be rationally drawn from the proven facts. Bearing in mind that Petitioner was acquitted on the intentional murder count, the state court's assessment of the evidence had to be made on the assumption that Petitioner did not *intend* to cause the victim's death. The state courts were therefore squarely presented with the question of whether the evidence supported a finding of depraved indifference, as opposed to mere recklessness, which , in turn, required the state courts to attempt to draw a rational distinction between these two elements and to then apply that distinction, as interpreted by the New York Court of Appeals, to the facts of this case. When the District Court held that Petitioner's constitutional claim is

"inextricably intertwined" with the legal sufficiency issue, it was simply stating the obvious: that legal sufficiency cannot be determined without first understanding the difference between a "substantial risk of death" and a "very substantial risk of death".

Had Petitioner been found guilty of intentional murder, the legal sufficiency argument would not necessarily have entailed Petitioner's equal protection and due process issues. But, as the District Court noted, since the jury found that Petitioner did *not* intend to kill the victim, the legal sufficiency argument automatically triggered the question: what evidence in this record determined the degree of Petitioner's culpability? There is a critical difference between an analysis of the evidence to determine (1) whether it supports a finding of intent and, if so, whether such intent was justified as a matter of self defense, and (2) whether it supports a finding of depraved indifference as opposed to recklessness. Contrary to the reasoning of the Second Circuit, it was the latter, *not* the former, analysis which the state courts were asked to perform when Petitioner raised his legal sufficiency argument.

"[I]dentical grounds may often be supported by different legal arguments" and "[s]hould doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Sanders*, 373 U.S. at 16. "The legal theory relied upon in the federal court need not . . . be identical to the legal theory presented to the state courts". *Waterhouse v Rodriguez*, 848 F.2d 375, 380-381 (2nd Cir. 1988) While Petitioner's state counsel may not have explicitly challenged the statutory criteria for distinguishing reckless manslaughter from depraved indifference murder, such a challenge was inextricably intertwined with Petitioner's argument that the evidence did not support a finding of the more serious crime.

Claims may be substantially re-formulated and survive the exhaustion defense. *Vasquez v Hillery*, 474 U.S. 254 (1986)[9] In *Daye v. Attorney General of State of N.Y.*, 696 F.2d 186, 192 (2nd Cir. 1982), the Second Circuit observed that while "[t]he chief purposes of the exhaustion doctrine would be frustrated if the federal habeas court were to rule on a claim whose fundamental legal basis was substantially different from that asserted in state court", the phrase "same legal 'basis' or 'doctrine'" does not "mean that there can be no substantial difference in the legal theory advanced to explain an alleged deviation from constitutional precepts." *Daye*, 696 F.2d at 192, fn. 4. Thus, for example,

> constitutional doctrine forbids use of a confession against a defendant unless the confession was voluntary. A number of legal theories may be advanced as to why a confession was not voluntary. Yet all that is needed to alert the state courts to the constitutional nature of the claim is the exposition of the material facts and the assertion that the confession was not voluntary. In United States ex rel. Kemp v. Pate, 359 F.2d 749 (7th Cir.1966), for example, the petitioner challenged the voluntariness of his confession in both court systems. In state court he argued that he had confessed as a result of physical coercion; in federal court he added the argument that coercion was shown by the "totality of the circumstances," including psychological coercion. The Seventh Circuit held that state remedies had been

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[9] The exhaustion requirement does *not* forbid a habeas petitioner from providing additional legal support in his federal petition. *MacFarlane v Walter*, 179 F.3d 1131, 1138 n 9 (9th Cir. 1999), *vacated and remanded on other grounds* 120 S.Ct. 1959 (2000) ("[e]xhaustion of remedies does not require that the state have had the opportunity to pass on the claim under the particular authorities advanced in the federal habeas court")

> exhausted, because, although the defendant had not made the "totality of the circumstances" argument in state court, the ultimate constitutional question – the voluntariness of the confession – had been presented.

Daye, supra. The *Daye* Court further noted that *Kemp* was cited with approval by this Court in *Picard* as follows:

> Obviously there are instances in which "the ultimate question for disposition," *United States ex rel. Kemp v. Pate*, 359 F.2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. *See Sanders v. United States*, 373 U.S. 1, 16, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963).

Daye, supra, quoting Picard, 404 U.S. at 277.[10]

In the case at bar, one of the "the ultimate question[s] for disposition" was whether Petitioner's conviction was based upon insufficient evidence and therefore in violation of his federal constitutional right to due process. Despite any presumed "variations in the legal theory" between Petitioner's state court motions and appeal, on the one hand, and his federal

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[10] See, also, *Ramirez v Attorney*, 2001 WL 1028326, *5-6 (state court argument which contained no reference to the Sixth Amendment right of effective assistance nevertheless permitted federal *habeas* review of that claim because the discussion in the state court application regarding lapses in representation was enough "to call to mind [the Sixth Amendment's] specific right [to the effective assistance of counsel]"); *Gonzalez v Sullivan*, 934 F.2d 419 (2nd Cir. 1991) (a petitioner's mere citation to the Fourteenth Amendment in heading of brief, without even minimal argument or citation to federal cases, satisfied exhaustion requirement by placing state courts on notice of due process claim.).

court habeas petition, on the other, the question of due process remained the same. Just as "a number of legal theories may be advanced as to why a confession was not voluntary", *Daye*, *supra*, so, too, may "a number of legal theories be advanced as to why" Petitioner's verdict was not supported by legally sufficient evidence and was therefore violative of Petitioner's right to due process. Petitioner's argument concerning the unconstitutionality of the statutory scheme is simply additional legal support to his insufficiency/due process argument, and not a separate, independent challenge.

Petitioner therefore submits that his state court sufficiency-of-the-evidence claim fairly informed the state courts of both the factual and the legal premises of his constitutional claim and provided those courts with a meaningful opportunity to take corrective action. Accordingly, the Court of Appeals below erred in holding that Petitioner failed to satisfy the exhaustion requirement.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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